

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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## **CRIMINAL CASE FILINGS AVAILABLE FOR PUBLIC VIEWING ON PACER, EFFECTIVE NOVEMBER 1, 2004, AND SEALED/REDACTED FILING REQUIREMENTS**

The United States District Court for the Northern District of West Virginia is readying its implementation of the Case Management/Electronic Court Filing (CM/ECF) system. CM/ECF is an Internet-based document filing system. All pleadings and court filings normally submitted and received in "hard copy" form will soon be immediately available via the Internet in a portable document format (PDF).

*The new CM/ECF system will use November 1, 2004 as the effective date when all "hard copy" filings will be available for public viewing through PACER. Unless counsel take affirmative steps to file sensitive materials after this date under seal or through the use a redacted version and reference list (as explained below), all criminal pleadings will be available for public viewing on PACER.*

Counsel must take care to insure that sensitive client information that is sometimes included in a criminal pleading is protected. This can include such pleadings as a motion for competency evaluation; applications for subpoenas that list the theory of defense; witness lists that include home addresses; and sentencing memoranda that might list substance abuse history, medical and psychiatric treatment, or other highly personal information, etc.

Prior to November 1, 2004, PACER access would only list the filing by name; the actual pleading could not be viewed in its entirety through PACER. This will change, effective November 1, 2004. This includes both traditional "hard copy" filings, as well as electronic filings later submitted when the CM/ECF system is in operation.

The district court judges will soon issue a Notice of Electronic Availability of Case File Information. Both the notice and the local rules for CM/ECF will be posted on the Court's internet site at [www.wvnd.uscourts.gov](http://www.wvnd.uscourts.gov)

The Notice will outline the sealing and redaction requirements for documents containing sensitive information. First, a party may file an unredacted document under seal. This would usually be done where the sensitive information is in narrative form and it is not conducive to piecemeal redaction. For documents that contain other sensitive information, like social security numbers; names of minor children; dates of birth; financial account information or home addresses, a redacted version can be filed with the Court. For example, the social security number in this public filing would be XXX-XX-1234, including only the last true digits of the number. In addition to this public filing, the party must file a reference list under seal that completely identifies this sensitive information for the Court and opposing counsel. This new process will insure both public access to information as Congress

intended and litigants' privacy interests.

### **CM/ECF REQUIREMENTS**

When the Case Management and Electronic Court Filing (CM/ECF) system is finally in full operation, all pleadings that were filed in "hard copy" format must be filed electronically. In a federal criminal case, one can expect to submit and receive charging documents, pleadings, motions, memoranda, voir dire questions, jury instructions, and orders via the CM/ECF system. Participation in the electronic filing system will be mandatory unless counsel is granted leave from the Court in a particular case.

More information will become available through the Clerk's Office as the CM/ECF system nears its operational date. However, any CJA Panel Attorney utilizing the CM/ECF system will need to acquire the following equipment and software: a Pentium PC with at least 64 MB RAM; Windows 95 or higher; Internet Explorer 6.x; Internet access (broadband recommended) with e-mail address; Adobe Acrobat Reader and Writer Programs; and a Scanner.

### **BLAKELY UPDATE**

Defendants' briefs were recently submitted to the U.S. Supreme Court from the First Circuit case of United States v. Fanfan and the Seventh Circuit case of United States v. Booker. The U.S. Supreme Court is scheduled to hear oral argument in October and later determine whether the rationale of Blakely v. Washington applies to the Federal Sentencing Guidelines. Blakely held that the relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely

on the facts reflected in a jury verdict or admitted by the defendant at a guilty plea hearing.

Until the U.S. Supreme Court rules, parties in the Fourth Circuit continue to be bound by United States v. Hammoud, 378 F.3d 426 (4<sup>th</sup> Cir. 2004). The Fourth Circuit joined a circuit split by holding that Blakely does not render the Federal Sentencing Guidelines unconstitutional. However, given the inherent uncertainties surrounding this issue, the Hammoud opinion directs that district courts impose two different sentences and include each sentence in the written judgment order. One sentence must be under the applicable Federal Sentencing Guidelines; a second sentence must be based on the factors outlined in 18 U.S.C. §3553. The full 59-page *en banc* opinion in Hammoud issued from the Fourth Circuit on September 8, 2004, 2004 WL 2005622.

Pursuant to a directive recently issued by the DOJ, some federal prosecutors here in the district are seeking superseding indictments that include sentencing enhancements based on various sections of the Federal Sentencing Guidelines. This practice may very well be deemed constitutionally required once the Supreme Court rules. However, in the interim, at least one district court has stricken the inclusion of such information from the indictment, United States v. Mutchler, \_\_\_ F.Supp. 2d \_\_\_, 2004 WL 2004080 (S.D. Iowa).

Copies of the briefs filed in Fanfan and Booker, and the full opinions in Hammoud and Mutchler may be obtained from the Federal Public Defender Office by calling (304) 622-3823.

### **BOP'S M.I.N.T. PROGRAM**

Those representing female clients who are both pregnant and facing federal incarceration should be aware of the Federal Bureau of Prison's Mothers and Infants Nurturing Together (MINT) Program. The BOP contracts with the Greenbrier Birthing Center in Hillsboro, West Virginia for services.

Female federal inmates who might otherwise be housed at FCI Alderson in southern West Virginia are allowed to reside at the birthing center for up to three months before child birth in order to take advantage of better prenatal care. After birth, both mother and child are allowed to remain together at the Greenbrier Birthing Center for 12 to 18 additional months. This program is not available if the expectant mother is considering adoption.

Recommendations for the BOP's MINT Program should be made by the district court at sentencing and included in the written judgment order.

#### **2004 WINNING TRIAL STRATEGIES MATERIALS AVAILABLE ON-LINE**

The Training Branch of the Office of Defender Services has posted all seminar materials from the 2004 Winning Trial Strategies seminars that were held across the country these last several months.

These materials may be found on the Defender Services website at [www.fd.org](http://www.fd.org) under the "Publications & Materials" section. The postings from this year's seminars include:

- Fifth Amendment Statements.
- Discovery: The Long Journey to Nowhere.
- Litigating False Confession Cases.

- Ethical Issues When a Client's Testimony May be False.
- Prosecutorial Misconduct.
- Representation in Multi-Defendant Cases.
- Guide to Joint Defense Agreements.
- Sample Severance Motions.
- Understanding Affirmative Defenses.
- Methamphetamine Cases and Sentencing Guideline Issues.

The 2005 season of Winning Trial Strategy sessions and other training programs offered to CJA Panel attorneys will be posted in the January 2005 edition of the *Quarterly*.

#### **STAFFED FEDERAL DEFENDER OFFICES UPDATE**

Due to GSA construction delays, the staffed Defender Office on the second floor of the U.S. Courthouse in Wheeling, West Virginia will not open until January 14, 2005. Assistant Federal Public Defender L. Richard Walker will staff that office upon its completion. Because of 2005 fiscal year uncertainties, a new staffed Defender Office in Martinsburg, West Virginia was temporarily tabled. A Martinsburg staffed office and the hiring of a third Assistant Federal Public Defender was previously approved by both the 4<sup>th</sup> Circuit and Judicial Conference.

#### **2004 CRIMINAL CASE STATISTICS**

During fiscal year 2004 (10/1/03-9/30/04), the Defender Office opened 176 cases and closed 150 cases. The CJA Panel attorneys received 219 criminal cases.

**FOURTH CIRCUIT ROUND-UP OF  
NOTABLE CASES:**

Published Opinions:

United States v. Holmes, 376 F.3d 270 (4<sup>th</sup> Cir. 2004).

- Detailed factual analysis supporting protective search of vehicle for weapons after traffic stop under Michigan v. Long.
- Court finds police officers justified in conducting protective search of vehicle for weapons even after suspects handcuffed and secured in police cruiser based on *possibility* suspects would have later access to weapons.

United States v. Martin, 378 F.3d 353 (4<sup>th</sup> Cir. 2004).

- North Carolina misdemeanor sentence of 60-days, imposed by district court and being considered *de novo* by superior court, does not count as a “prior sentence of imprisonment” and two criminal conviction points.
- North Carolina’s two-tiered court system renders review of sentence “totally . . . stayed.” under §4A1.2(a)(3).
- As a result, conviction only carries one criminal history point.

United States v. Moussaoui, \_\_\_ F.3d \_\_\_, 2004 WL 2029733 (9/13/04)

- Post 9/11 case where Court holds that enemy combatant has access to classified government witnesses who may possess exculpatory information.
- Court remands so parties can craft “adequate substitutions” for witness depositions.
- Interesting opinion in that entire pages of

the ruling are redacted and omitted to protect classified intelligence.

United States v. Hammoud, 381 F.3d 316 (4<sup>th</sup> Cir. 2004).

- En Banc opinion where Fourth Circuit rules that Federal Sentencing Guidelines are constitutional in light of Blakely.
- Court rules on constitutionality of “material support to a foreign terrorist organization” violation, 18 U.S.C. §2339B.

Unpublished Opinions:

United States v. Bayne, 103 Fed. Appx. 710 (4<sup>th</sup> Cir. 2004).

- Four level downward departure affirmed in possession of sawed-off shotgun case based on Lesser Harms, §5K2.11.
- Court finds reduction appropriate where defendant loaned shotgun to friend, shotgun was returned in sawed-off condition, and defendant simply stored shotgun in his home.

United States v. Sanders, 2004 WL 1908299 (8/27/04).

- West Virginia conviction for fleeing on foot from a police officer, §61-5-17(d), excluded from criminal history calculation as the elements test establishes conviction resembles “hindering or failing to obey a police officer under §4A1.2(c)(1).